Supreme Court of the United States

October Term, 1940

No. 552...

MAUD S. WILLIAMS,

Petitioner,

against

NEW JERSEY-NEW YORK TRANSIT COMPANY.

Brief in Opposition to Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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JAMES S. HAYS,
Of Counsel.

INDEX

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Facts

The facts in this case are succinctly stated in the unanimous opinion of the Circuit Court of Appeals of the Second Circuit rendered by Learned Hand, J., and reported at 113 Fed. (2d), page 649.

The plaintiff, a passenger in the defendant's bus, claims to have been injured by a briefcase which fell from a baggage rack and struck her. Her sole claim of negligence was predicated upon the wholly unsupported claim that the baggage rack was negligently constructed. The proof shows that the plaintiff boarded the defendant's bus in New Jersey (R. 21). A fellow passenger placed a brief-

case in a baggage rack after plaintiff had taken her seat in the bus (R. 23). No claim was advanced that the driver of the bus saw the briefcase placed in the rack. While still in New Jersey and approximately one mile past the place where the plaintiff had boarded the bus the bag is claimed to have fallen.

The jury was permitted to view the bus. During the mile run the bus swayed from side to side but not sufficiently to dislodge any passenger from his seat or to require anyone to call the driver's attention to it. The case was submitted by the trial court to the jury solely on the question of whether the baggage rack was properly constructed, to all of which the plaintiff made no objection. The defendant contended that the case should not have been submitted to the jury but that under New Jersey law the plaintiff had failed to make out a cause of action in negligence.

Preliminary Statement

1. The incident above recited occurred in the State of New Jersey. The Circuit Court was therefore called upon to determine this case by considering and applying the New Jersey law.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, 80.

Despite other arguments made in the petitioner's brief in support of the petition, the sole question properly presented on this application is whether or not the Circuit Court has decided a question of New Jersey law in a way probably in conflict with applicable New Jersey decisions (U. S. Supreme Court, Rule 38b). We respectfully maintain that the Circuit Court's decision is in accord with New Jersey law and, since we deem petitioner's citation of authorities other than New Jersey authorities irrelevant, we will refrain from commenting upon them.

POINT I

The Circuit Court's decision is in accord with New Jersey Law.

The record discloses that *without objection or exception by plaintiff's counsel,* this case was submitted to the jury on one single question, namely, was the baggage rack of the bus properly constructed. This appears from Judge Coxe's charge, wherein he stated:

> "In this case I am submitting to you as the sole question or sole issue of negligence whether the defendant was guilty of negligence in having a baggage rack in the condition that has been described during the testimony, and if so whether the injuries which the plaintiff is now suffering were caused by such negligence." (R. 287; see, also, R. 298, R. 283.)

The Circuit Court, in its opinion, at page 650, in reviewing the record stated as follows:

> "Both sides agree that the law of New Jersey measured the defendant's liability and it is apparent —although plaintiff disputes it—that the judge was right in leaving nothing to the jury but the construction of the rack."

The Circuit Court exhaustively reviewed the pertinent New Jersey decisions and came to the following conclusion:

> "In New Jersey a passenger in order to recover because of a defect in the equipment of a common carrier—though not because of a defect in its operation —must show that the carrier diverged from some standard which has been in general use in equipment of the kind *or at least that the construction is unusual."* (Italics ours.)

Concededly, the plaintiff offered not a scintilla of evidence either that the baggage rack departed from an accepted standard, that there was an accepted standard or that the construction was unusual.

All of the pertinent decisions on this question in the State of New Jersey have been painstakingly considered and reviewed by Judge Learned Hand in his opinion. No useful purpose can be served by us reviewing these decisions further here and we will content ourselves in quoting only from one of such cases, namely, the case of *Traphagen* v. *Erie Railroad Company*, 73 N. J. Law 759. In that case, a passenger caught her heel in the step of a railway car. It was claimed that the step was negligently constructed. The plaintiff failed to prove any departure from the usage of other railroads. At the close of the plaintiff's case, the trial judge ordered a nonsuit.

In sustaining the decision of the trial justice, the New Jersey Court of Errors and Appeals stated as follows, at pages 761-762:

> "We do not mean to say that a railroad company can construct the steps of its cars as it pleases. It must, of course, afford reasonable means for alighting and must use careful judgment in the method of construction it adopts, but when it appears, as in this case, that the steps are similar to those in common use, which must have proved sufficient for hundreds of passengers, and were actually sufficient for two passengers who alighted just before the plaintiff, *and when, also, there is a failure to prove any departure from the usage of other railroads,* we think there is no proof which would justify a jury in finding the defendant negligent. *To permit such a finding would practically substitute the judgment of a jury for the judgment of the railroad managers, the result would vary with each case, and subject the railroad to the danger of being found guilty of negligence no matter what plan it adopted.*" (Italics ours.)

In a concurring opinion, one of the judges stated as follows:

> "I shall vote to affirm the nonsuit in this case solely upon the ground that there was not sufficient proof to go to the jury upon the question of whether the car steps and the station platform were constructed in the ordinary way."

The foregoing case and all of the authorities cited by Judge Learned Hand in his opinion enunciate the rule that in the State of New Jersey a jury will not be permitted in the absence of affirmative evidence to speculate as to what is proper construction of equipment and to substitute its judgment for that of the public conveyance managers, and, to use the language of the Court of Errors and Appeals in New Jersey in the *Traphagen* case, *supra*, to "subject the railroad to the danger of being found guilty of negligence no matter what plan it adopted."

As indicated by the opinion of Learned Hand, J., in the conclusion of his opinion, at page 652, that is the rule in New Jersey, and it is a just rule, for, as Judge Learned Hand stated:

> "Today when public utilities are generally regulated by commissions of one sort or another, this may very well be a desirable rule; in any event it is not for us to change it."

We respectfully submit that since there was no proof in this case of any kind or nature to indicate that the baggage rack in question was constructed in any manner different from that used on other public conveyances, or that its construction was unusual, the Circuit Court of Appeals was correct in dismissing the plaintiff's complaint.

Petitioner's brief attempts to demonstrate that the determination of the Circuit Court is in conflict with New Jersey law, not by citing cases considering the questions

treated in the cases cited by the Circuit Court, but by quoting general language from cases considering other subject matter. These authorities are inapplicable, because

1. This case was not tried upon the theory considered in such cases, and such arguments should not be considered.

See: *Osgoodby* v. *Talmadge*, 45 Fed. (2d) 696 (C. C. A. 2nd);
U. S. v. *Johnson*, 98 Fed. (2d) 462 (C. C. A. 8th);
Virginian R. Co. v. *Mullins*, 271 U. S. 220, 227.

2. The Circuit Court, in its opinion at page 650, correctly disposed of these arguments by stating as follows:

> "Since, as we have said, the accident happened when the bus had gone only a mile beyond the place where the plaintiff boarded it, even though the other passenger had put the briefcase in the rack shortly after she had sat down, the interval was not long enough to charge the defendant with notice that it was stowed negligently, if in fact it was. There was no evidence that the driver actually saw it; nor was the evidence material that the bus swayed violently as it rounded the curves. The plaintiff did not indeed request any addition to the judge's charge. If therefore the plaintiff did not prove that the rack was negligently made, she could not recover."

The aforesaid conclusion reached by the Circuit Court was correct, as we will show in Point II hereof.

POINT II

Petitioner's authorities are inapplicable.

Petitioner's authorities are inapplicable either because petitioner's brief fails to disclose the full facts of the cases cited or because petitioner has quoted general language from cases without considering the facts of the particular cases.

An example of this is petitioner's reference (brief, p. 7) to the case of *Holda* v. *Public Service Co-ordinated Transport*, 11 N. J. Misc. 879, with the misleading statement that in that case "a passenger in a motor bus was injured by a suitcase." The passenger in that case was not injured by a suitcase but tripped over a suitcase which was sticking out in the aisle directly opposite the bus driver, who saw the suitcase being placed there and kept watching it from time to time. The statement quoted in petitioner's brief,—made by an intermediate Court of Appeals of the State of New Jersey,—was based upon the fact that the bus driver knew of the condition of the suitcase and did nothing to remedy it. That case, of course, has no application to our case, where it is conceded and the testimony of the plaintiff affirmatively shows that the bus driver did not see the briefcase being placed in the baggage rack, but that the briefcase was placed there by a fellow passenger in the view of the plaintiff without notice to the bus driver.

Similarly at pages 14-15 of the brief, petitioner quotes general language from cases with respect to the degree of care owed by a carrier to a passenger. This general language from these cases standing alone might be sufficient as a general statement of law but the question for determination is whether or not the rule applies in the case at bar and even if it does, which is not conceded, whether that care has been violated in the case at bar.

A reading of petitioner's cases will disclose that they do not consider situations where negligence is sought to be charged because of alleged defective appliances. The duty in such cases is clearly set forth by the Court of Errors and Appeals of the State of New Jersey in the case of *Feil* v. *West Jersey and Seashore Railroad Company*, 77 N. J. L. 502, 504, *supra*, as follows:

> "The duty of a railroad company to take care of the safety of its passengers, *so far as the furnishing of appliances is concerned*, is fully performed when those appliances are of standard character and in proper repair." (Italics ours.)

In *Traphagen* v. *Erie Railroad Company*, 73 N. J. Law 759, the court said:

> "* * * the railroad company is not bound to exercise an infallible judgment. It is guilty of no breach of duty if it selects an instrument in common use and approved by experience."

In *Kingsley* v. *Delaware, L. & W. Railroad Company*, 81 N. J. Law 536, *supra*, the Court of Errors and Appeals again reiterated this same rule and stated as follows at pages 544-545:

> "The case at bar, however, is devoid of even these elements of liability, and no attempt is made to establish defendant's liability upon the ground of notice or presumptive notice, but solely upon the ground that, because of the happening of the injury to the plaintiff, ex necessitate a mode of car construction which up to that period, and presumably since, has stood the test of use and experience may be singled out and condemned as a species of malconstruction, upon a basis of comparison which in the same breadth admits that there is no recognized standard of comparison, and hence no basis for the condemnation of the judgment as a tort-feasor.
>
> "In the final analysis, the testimony in the case at bar demonstrates simply a difference of construc-

> tion between the defendant's car and platform and some of the cars and platforms of other companies; but upon legal principle, *until that difference can be transmitted into a legal generalization indicating a variation from the existence of a standard type, the departure from which by the defendant might be construed as imprudent and negligent, and by which a criterion of duty may be established, the damage incurred under circumstances such as are presented in the case at bar must be held to be damnum sine injuria, and can impose no liability upon the defendant.*" (Italics ours.)

Finally in the case of *Hansbury* v. *Hudson & Manhattan Railway Co.* (Decided May, 1940), 124 N. J. L. 502, the court had before it a situation substantially identical with that in the *Kingsley* case, *supra.* In that case a passenger stepped into a space of 13 inches between the car and the platform. She argued that later cases have overruled the doctrine of the earlier decisions cited by us but the court concluded that this was not true and in affirming the nonsuit stated:

> "There being no evidence of any negligence in the construction of either the car or the platform, it is evident that it violated no duty owed to the plaintiff."

Even in cases where the standard of care urged by petitioner was recognized by the New Jersey courts, such courts have held, that the plaintiff has not satisfied its burden of proof by merely showing that an accident occurred.

See: *Meelhein* v. *Public Service Co-ordinated Transport,* 121 N. J. L. 163 (Court of Errors & Appeals, 1938);

Byron v. *Public Service Co-ordinated Transport,* 122 N. J. L. 451 (Supr. Ct., 1939).

In the *Meelhein* case, *supra*, the Court of Errors and Appeals in dismissing the complaint stated as follows:

> "Therefore, taking as true the stopping of a common carrier's motor bus on a steep grade, and from twelve to twenty inches from the curbing, without more, and giving thereto the benefit of all legitimate inferences deductible therefrom (Jones v. Public Service Railway Co., 86 N. J. L. 646; Fox v. Great Atlantic, &c., Co., 84 id. 726), we must determine whether or not same violated the defendant's duty of using a high degree of care for the safety of the plaintiffs, and of providing a reasonably safe place for them to alight, and we conclude that such proof standing alone, is insufficient to impose upon the defendant the burden of going forward, and therefore, the ruling of the trial court is affirmed."

In the *Byron* case, *supra*, the court after discussing the standard of care urged by petitioner, and, in dismissing the plaintiff's complaint, stated as follows:

> "The onus was upon Byron to establish by evidence that the car construction in the respects complained of was not in conformity with the common standard governing well regulated common carriers employing like means of transportation. There must be proof of a breach of the duty thus owing to the passenger. The carrier is not an insurer of his safety. The case is obviously not one of a negligent performance of an assumed duty of protection—'of furnishing guard rails on trolley cars,' as alleged in the amended complaint."

When we read the cases cited by petitioner in support of petitioner's argument with respect to the duty of care owed to passengers, we find that these cases are completely inapplicable.

The case of *Gore* v. *D. L. & W. Railroad Company*, 89 N. J. Law 224 (br. pp. 12-13), was distinguished by the Circuit Court at page 651 of its opinion and the Circuit Court indicated that the case was decided upon the fact

that the plaintiff was forced to get off at a dist
the proper place *in the night and without lights.* nce from
was also distinguished by the New Jersey Supr This case
in the case of *Hansbury* v. *Hudson & Manhatta* me Court
Company, 124 N. J. Law. 502, *supra.* *Railroad*

The case of *Hanson* v. *N. J. Street Railway* *Company,*
64 N. J. Law 686 (br. p. 13) considers a case of ering of a railroad car. ercrowd-

The quotation from the case of *Barney* v. *H* *udson &*
M. R. Co., 105 N. J. Law 274 (br. p. 14), decid d by the
Supreme Court of New Jersey, must be confin d to the
facts of that case which were as follows as taken from the
opinion:

> "When the train started she lost her ba
> grabbed the jaub of the open intercomm ance and
> door. 'Just then' the conductor came th nicating
> doorway from the car ahead and 'slammed ough the
> on plaintiff's finger, inflicting the injury fr the door
> suit was brought." m which

The last mentioned case was not an appliance case and
was decided solely because of the negligent acts o the con-
ductor, as a full reading of the opinion discloses.

The case of *Scott* v. *Bergen,* 63 N. J. Law 4 , (br. p.
14), decided by the Supreme Court of New Jer y was a
case where a trolley car gave a sudden lurch for yard and
a passenger lost her balance. The case is not pplicable
and in any event the case has not been follow d by the
Court of Errors and Appeals of the State of New Jersey.

See: *Faul* v. *North Jersey Street Railway Co.* 70 N. J.
Law 795, discussed *infra.*

The case of *Wall* v. *G. & R. Wood Inc.,* 11 N. J. L.
442, is a case where a bus stopped and plaintiff spoke to
the bus driver as he was getting off. The bus th n gave a
sudden jerk and the bus driver stated to the plai tiff "my
foot must have slipped, and I am sorry."

It is respectfully submitted that none of these cases are in any wise applicable to the facts in the case at bar and do not in any wise detract from or alter the rule set forth in the New Jersey cases cited by the Circuit Court in its opinion.

The other points raised by petitioner.

1. *Res Ipsa Loquitur.* Plaintiff abandoned this claim at the trial by failing to object to the Court submitting the case to the jury solely on the question of the manner in which the baggage rack was constructed. Nevertheless petitioner now seeks to inject the doctrine of *res ipsa loquitur* into this case and, in support thereof, cites the cases of *Mumma* v. *Eastern & A. R. Railroad Company,* 73 N. J. Law 653; *Rapp* v. *Butler,* 103 N. J. Law 512. These cases have no application, since the doctrine of *res ipsa loquitur* does not apply to a case such as this, as we hereinafter show.

The authorities are clear that the doctrine of *res ipsa loquitur* does not apply unless it is shown that the thing that caused the accident: the briefcase, was under the exclusive control of the defendant, and, unless the circumstances of the accident, unexplained, identifies the defendant as the sole negligent party.

See: *Conover* v. *D. L. & W. Railroad Co.,* 92 N. J. Law 602 (Court of Errors & Appeals);
Watson v. *Penn-Reading Seashore Lines,* 122 N. J. Law 614 (Supreme Court, July 1939);
Whitcher v. *Board of Education,* 233 App. Div. 184.

The case of *Watson* v. *Pennsylvania-Reading Seashore Lines,* 122 N. J. L. 614, *supra,* is the most recent decision of a New Jersey Appellate Court on this question. In that case, plaintiff was a passenger on a train. He occupied a

seat immediately next to the window, which was open. He claimed that a small piece of stone came through the open window and struck his left eye. The stone was identified as a trap rock which "is used in the manufacture of concrete asphalt roads and railroad ballast." The Appellate Court of New Jersey, in sustaining a judgment of nonsuit and in holding that *res ipsa loquitur* did not apply, stated as follows:

> "It is contended that the nonsuit was erroneous; that proof of the facts above set forth were sufficient under the doctrine of *res ipsa loquitur* to raise an inference of negligence which the defendant was bound to explain or negative. Reliance is placed upon cases of which Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. Rep. 645; Mumma v. Easton & A. R. Co., 73 N. J. L. 653, 65 Atl. Rep. 208, are typical.
>
> "But we are unable to agree that the occurrence in question affords *prima facie* evidence that there was want of the high degree of care incumbent upon common carriers. In cases where the doctrine of *res ipsa loquitur* applies it is an essential that the agency causing the mischief be under the control of the party charged with liability. Such is not the case here. There is no proof that the small stone which caused this most unfortunate injury was part of the road ballast or that it came from the roadbed at all. It might quite conceivably have been thrown by a mischievous person. On this important element of the case the court was right in not leaving the matter to speculation."

The rule is aptly and tersely stated by the New York Appellate Division of the Third Department in the case of *Whitcher* v. *Board of Education*, 233 App. Div. 184, *supra*, wherein Van Kirk, J., stated as follows (pp. 184-185):

> "It was prejudicial error to introduce the doctrine of *res ipsa loquitur*. That doctrine does not apply to this case. The circumstances of the accident

and the injury do not identify the wrong
(Hardie v. Boland Co., 205 N. Y. 336.) They doer.
plained, do not identify this defendant as the unex-
negligent party (Plumb v. Richmond Light and solely
Co., 195 App. Div. 254; aff'd 233 N. Y. 285). R. R.
'The doctrine of *res ipsa loquitur*, although it * * *
vides a substitute for direct proof of negli t pro-
where plaintiff is unable to point out the specifigence
of negligence which caused his injury, is a rific act
necessity to be invoked only when, under the ciule of
stances involved, direct evidence is absent andcum-
readily available. * * * Hence, the presumptiod not
inference arising from the doctrine cannot be avon or
of, or is overcome, where plaintiff has full knowvailed
and testifies as to the specific act of negligence vledge
is the cause of the injury complained of.' (45 which
1206; Plumb v. Richmond Light & R. R. Co, C. J.
N. Y. 285.)" ., 233

As in the *Whitcher* case, *supra*, plaintiff gave fu
timony as to how the accident occurred. The circumsll tes-
of the accident, unexplained, did not identify defendtances
the solely negligent party. The last mentioned case ant as
proved by the Court of Appeals of the State of New is ap-
as sound law in *Bressler* v. *New York Rapid Transit* & York
ration, 270 N. Y. 409. *Corpo-*

The cases of *Rapp* v. *Butler*, 103 N. J. Law 51
Mumma v. *Eastern N. A. R. Co.*, 73 N. J. Law 653 2, and
pp. 7, 11, 12), dealing with the question of *res ipsa lo* (brief,
are clearly inapplicable. The *Rapp* case was decided *quitur*
Supreme Court of New Jersey. In that case, a whee by the
off a bus, and plaintiff, a passenger in the bus, was in l came
The accident was caused by part of the equipment of njured.
dislodging itself. It was not caused by a briefcase the bus
from a rack after being placed there by a fellow pas falling
That case would be applicable if the baggage rack itssenger.
and hit the plaintiff but is not applicable under the self fell
our case. The *Mumma* case was a case where a facts of
locomotive emitted steam which frightened a horse ailroad
on the

bridge overhead. Concededly, there the steam was caused by the railroad.

The plaintiff also cites the case of *Bressler* v. *New York Rapid Transit Corporation*, 277 N. Y. 200. This case is not a New Jersey case, and is inapplicable because in that case the plaintiff was injured *by shattered glass from the train window*, and, as a reading of the record shows, there was no proof in plaintiff's case as to how the glass was broken. The New York Court of Appeals held, that, since plaintiff was hurt by a portion of defendants equipment, she could rely on the doctrine of *res ipsa loquitur*. That is not so in the case at bar. Plaintiff was not hurt by a portion of the equipment but by a briefcase that concededly was not under the control of defendant. However, compare that case with the decision of the New Jersey court in the case of *Watson* v. *Pennsylvania-Reading Seashore Lines*, 122 N. J. L. 614, *supra*, wherein the New Jersey Appellate Court refused to apply the doctrine in a case where a passenger was injured, not by part of the equipment of the conveyance, such as glass, etc., but by a piece of stone which came in through an open window.

2. *The swaying of the bus.* The Circuit Court, in its opinion, further pointed out that evidence of the swaying of the bus, which petitioner urges here, was completely immaterial. This is in accord with the New Jersey and general law on this subject.

See: *Faul* v. *North Jersey St. R. Co.*, 70 N. J. Law 795, 59 Atl. 148;
Pascell v. *North Jersey St. R. Co.*, 75 N. J. Law 836, 69 Atl. 171.

In the case of *Faul* v. *North Jersey St. R. Co.*, *supra*, plaintiff testified that he was thrown off the platform of defendant's trolley car on which he was riding as a passenger when "the car took a jolt." Other testimony in the case showed that the jolt which took place was caused by an

ordinary resumption of speed following the slowing down of the trolley car to avoid a collision with another vehicle. The court held, as a matter of law, that such jolts even though they cause injury, do not constitute negligence.

The Court of Errors and Appeals, in distinguishing the case of *Consolidated Traction* v. *Thalheimer*, 59 N. J. Law 474, on which the Court relied in deciding the case of *Scott* v. *Bergen County Traction Co.*, 63 N. J. L. 407, cited at page 14 of petitioner's brief, said:

> "The only decision of this Court which it may be well to distinguish from the case in hand is that of Consolidated Traction Co. v. Thalheimer, 59 N. J. Law 474, 37 Atl. 132. In that case the passenger, who was thrown off the street car, in the act of alighting, had notified the conductor of her desire to get off on a certain street, designated by her, and, after the conductor had called out the name of that street, had arisen and gone to the rear door in preparation of alighting. This Court held that under those circumstances, the jerk of the car justified an inference of some breach of duty owned to her by the carrier. Manifestly, the conduct of the company's agent was an invitation to alight, and was calculated to put the passenger off her guard at the very time she had a right to expect the car to become stationery. No such fact appears in the case at bar. That case is readily distinguishable from the present by the above circumstantial statement. The two cases rest upon different principles of classification."

In the instant case, as in *Faul* v. *North Jersey St. R. Co.*, *supra*, defendant's bus driver had not by any conduct on his part put plaintiff off her guard. On the contrary, he did not know of the existence of any condition (to wit: the placing of the bag in the rack) which would cause him to drive his bus in other than the usual manner. In the absence of such knowledge defendant's bus driver cannot be held responsible for the existence of a condition known to plaintiff but not known to the driver. *Meelheim* v. *Public*

Service, 121 N. J. Law, 163, 1 Atl. 2d, 418. There is nothing in the record to show that the joggling or swerving described by plaintiff was other than that usually experienced by passengers riding on busses, which is apparent from the fact that neither plaintiff nor anyone else on the bus saw fit to complain of it to the bus driver, and from the fact that neither plaintiff nor any other passenger on the bus was lurched from her seat. It is clear, therefore, that for such incidental joggling and swerving the defendant is not liable.

Burr v. *Penn. R. R. Co.,* 64 N. J. Law 30, 44 Atl. 845;

Corkhill v. *Camden,* 69 N. J. Law 97, 54 Atl. 522;

Rochat v. *North Hudson Co. Ry. Co.,* 49 N. J. Law 445, 9 Atl. 688;

Graf v. *West Jersey & S. R. Co.* (N. J. Supr. Ct., not officially reported) 62 Atl. 333;

Griggs v. *Erie R. R. Co.,* 71 Fed. 2d, 966 (C. C. A. N. J.).

In *Griggs* v. *Erie R. R., supra,* the Circuit Court of Appeals of New Jersey, in an action by a passenger for injuries sustained by reason of alleged lurching, said:

> "So far as this question has come before the American Courts, it has been held with practical unanimity that a railroad company is not liable for injury to a passenger on a fast train by lurching of the train due to sharp curves in the track caused by the configuration of the country, if the track is well constructed and the train properly operated under the circumstances of the case, as the risk of such injury is an incident of travel assumed by the passenger."

It is interesting to note that this rule has been applied in cases, in jurisdictions other than New Jersey, where passengers were injured when a satchel in an overhead baggage rack was dislodged by the movement of the vehicle.

Wade v. *North Coast,* 165 Wash. 418, 5 Pac. 2d, 985;
Whiting v. *N. Y. C. & H. R. R. Co.,* 97 App. Div. 11, 89 N. Y. Supp. 584.

In the portion of Point II of petitioner's brief, petitioner again makes reference to the court's charge. But the question of the court's charge is completely immaterial. The sole question presented was whether or not the plaintiff had submitted sufficient proof under the New Jersey law to warrant the submission of the case to the jury. Under the New Jersey law, the plaintiff failed to prove a case on the sole issue presented and which petitioner's trial attorney agreed was the sole issue litigated.

In petitioner's last point, petitioner has cited a number of Federal cases on the degree of care of carriers. These Federal cases are not applicable since this case must be determined by New Jersey law. At best, they state general rules of law in general negligence cases and even in such cases it is significant to note that the rule in New Jersey is not the highest degree of care but a high degree of care, and, even that rule is not applicable in New Jersey in appliance cases, as we have heretofore shown.

The case of *Spokane & Inland Empire Railroad Co.* v. *U. S.,* 241 U. S. 344, is cited by petitioner at page 17 of her brief. Aside from the fact that this case is inapplicable since it does not consider New Jersey law, the case generally has no application. That case was not a negligence case. The quotation, taken apart from the case itself, results in an unfair presentation. The government brought an action to recover penalties from the railroad for violation of the Safety Appliance Act, passed by Congress; the violation consisting of hauling, in interstate commerce, twelve cars not equipped with hand-holds or grappling irons, as required by the act, and three cars not equipped with automatic couplers. The railroad offered testimony

to show that the holds or grappling irons on the car were sufficient to accomplish the purposes required to be accomplished by the provisions of the Safety Appliance Act. The court merely held that without the aid of expert testimony the jury could determine whether the statute had been complied with. A standard had been fixed by the statute. In the case at bar there was nothing for the jury to compare. The expert testimony offered in the *Spokane & Inland* case, *supra*, to prove something other than that required by statute was clearly inadmissible. The New Jersey law has been firmly fixed that a departure from standard must be shown in cases such as that at bar before negligence can be inferred.

CONCLUSION

For the foregoing reasons, we respectfully submit that a writ of certiorari should be denied.

Dated, December 4th, 1940.

Respectfully submitted,

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JAMES S. HAYS,
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